



**Department of
Employment Dispute Resolution**

Grievance Procedure Manual

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Grievance Procedure Manual

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§1 Ways to Resolve Workplace Disputes

NOTE: Words **bolded** appear in the definition section.

§1.1 General Information

Complaints arising in the workplace should be resolved fairly and promptly. In selecting a suitable alternative to resolve a workplace issue or concern, an employee may obtain information and guidance from the Department of Employment Dispute Resolution (“EDR”) and the Human Resources Office at the employee’s agency.

For specific questions about the grievance procedure and its requirements, it is advisable to contact EDR, the state agency charged by statute to establish and administer the grievance procedure. EDR is located at One Capitol Square, 830 East Main, Suite 400, Richmond, VA 23219 and can be reached by telephone at 786-7994 from Richmond, or toll free at 1-888-23-ADVICE (232-3842) from elsewhere in Virginia. Additional information is available on EDR’s Web site, www.edr.virginia.gov.

Many workplace issues can be resolved through discussion. Other alternatives include the following:

§1.2 Mediation

One alternative for resolving disputes is the statewide **mediation** program administered by EDR. Mediation is a voluntary process through which neutral third persons (mediators) assist people in conflict to explore their differences and develop their own solutions to these concerns. A decision to mediate a dispute does not prevent an employee from initiating a **grievance** later. Where the parties have entered into an agreement to mediate, the time requirements of the grievance procedure may be extended by mutual agreement. TO BE ENFORCEABLE, THIS AGREEMENT MUST BE IN WRITING.

§1.3 Office of Equal Employment Services

If an employee thinks that she has been discriminated against, she may file a formal complaint with the Office of Equal Employment Services (“OEES”) at the Department of Human Resource Management (“DHRM.”) OEES investigates complaints of employment **discrimination** on the basis of race, color, gender (including sexual harassment), age, national origin, religion, political affiliation or against otherwise qualified persons with disabilities. An employee may not pursue both an OEES complaint and a grievance on the same matter. OEES may be reached by telephone at 225-2136 from Richmond, or toll free at 1-800-533-1414 from elsewhere in Virginia.

§1.4 Grievance Procedure

EDR administers the grievance procedure under which most workplace disputes can be grieved to three successive levels of agency management. Agencies must designate, in writing, their management step-respondents and submit the list to EDR for approval. Once the list is approved by the EDR Director, the agency must make it readily accessible to all employees. If the employee disagrees with agency management’s

resolution of the grievance, the employee may seek to have the grievance resolved by an independent hearing officer. Only certain types of grievances, however, will qualify for such a hearing. The grievance procedure has strict rules that must be followed by all parties. State law prohibits **retaliation** against employees for using or participating in the grievance process.

§1.5 Retaliation Investigation

An employee may ask EDR to investigate allegations of retaliation as the result of the use of or participation in the grievance procedure or for reporting, in good faith, an allegation of fraud, waste or abuse to the State Employee Fraud, Waste and Abuse Hotline. Where EDR determines that the request merits further review, EDR's authority is limited to investigating the complaint and advising the **agency head** of its findings. EDR is authorized to provide no other relief. An employee may not pursue both a retaliation investigation and a grievance on the same matter.

§1.6 Other Agency Resources

Other resources may be available for resolving workplace disputes. These resources may include: agency human resources or equal employment opportunity officers, ombudsmen, or the services of other agencies and organizations such as the Virginia Council on Human Rights or the Virginia Office for Protection and Advocacy (VOPA). However, for answers to questions regarding the grievance procedure, the appropriate source for information is EDR.

§2 Grievance Procedure Overview

NOTE: Words **bolded** appear in the definition section.

§2.1 Stages of the Grievance Procedure

The grievance procedure contains four phases:

1. Management Resolution Steps
 - First Resolution Step
 - Second Resolution Step Meeting
 - Third Resolution Step
 2. Qualification for Hearing
 3. Hearing
 4. Review of Hearing Decisions
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§2.2 Informal Discussion

Prior to the initiation of a grievance, an employee should discuss the dispute with her supervisor in an attempt to resolve the problem informally. Even when such discussions are ongoing, however, the written grievance must be initiated within 30 calendar days of the date that the employee knew, or should have known, of the event that formed the basis of the dispute. This 30-day requirement may be extended only if the parties agree. **TO BE ENFORCEABLE, SUCH AN AGREEMENT MUST BE IN WRITING.**

§2.3 Access to the Grievance Procedure

To access the grievance procedure, an employee must meet each of the following three criteria:

1. Must not be listed as exempt from the Virginia Personnel Act under §2.2-2905 of the Code of Virginia;
2. Must have been a non-probationary employee of the Commonwealth at the time the event that formed the basis of the dispute occurred; and,
3. Must have been employed by the Commonwealth at the time the grievance is initiated (unless the action grieved is a termination or **involuntary separation**, in which case the employee may initiate a grievance within 30 days of the termination or separation).

Agency management may deny an employee access to the grievance procedure on any of these grounds at any point following receipt of a written grievance. If management denies the employee access to the grievance procedure, the employee may ask the agency head to grant her access. The employee must make a written request to the agency head within **5 workdays** of receiving notification that access has been denied.

The employee may appeal to EDR the agency head's decision to deny access. This appeal must be made within 5 workdays of the employee's receipt of the agency head's decision. To appeal to EDR, the employee must submit her grievance form to the agency's Human Resources Office within 5 workdays of receiving notice that access to the grievance procedure has been denied. Within 5 workdays of receipt of the appeal request, the agency's Human Resources Office must mail a copy of the grievance record, complete with all **attachments**, to EDR. (The original grievance record should be kept by the agency).

If EDR denies the employee access, the employee may appeal to the circuit court. If the employee wishes to appeal to the court, the employee must submit her grievance form to the agency's Human Resources Office within 5 workdays of receiving EDR's access decision. Within 5 workdays of receipt of the appeal request, the agency's Human Resources Office must copy and mail the grievance record, complete with attachments, to the circuit court in the jurisdiction in which the grievance arose. The Human Resources Office must list the EDR Director as a copy recipient on the cover letter to the court accompanying the grievance record. The decision of the circuit court is final and nonappealable.

If the employee is ultimately determined to have access to the grievance procedure, the grievance is returned to the appropriate resolution step for a response on the merits.

§2.4 Initiating a Grievance

An employee must initiate a grievance on a fully completed "Form A." The "Form A" should be available at all state Human Resources Offices and is also available on EDR's web site. The "Form A" must state the claim, the facts in support of the claim, and the relief requested. If there is not enough space on the "Form A" for a complete statement, attachments may be used. Once the grievance is initiated, additional claims may not be

added. Assuming an employee has access to the grievance procedure, *any* employment related issue may be grieved, at least through the management steps, so long as the six rules set forth below are followed.

An employee's grievance must:

1. Be presented to management within 30 calendar days of the date the employee knew or should have known of the event that forms the basis of the grievance;
2. Arise in the agency in which the employee works;
3. Pertain directly and personally to the employee's own employment in a position with access to the grievance procedure;
4. Not be used to **harass** or otherwise impede the efficient operations of government;
5. Not have been pursued through another state process (for example, a formal discrimination complaint filed with the Office of Equal Employment Services); and,
6. Not challenge the same management action challenged by another grievance.¹

If any of these requirements are not met, management may notify the employee, using the "Form A," that the grievance will be administratively closed due to **noncompliance**. (See "Grievance Initiation Noncompliance," §6.2). The agency must also notify the employee on the "Form A" that the employee has the right to request a compliance ruling from the EDR Director to overturn the closing of the grievance. Any such ruling request must be made within 5 workdays of the notice of closure and be accompanied by a copy of the grievance record, complete with all attachments. (The original grievance record should be kept by the agency). The agency may raise noncompliance at any point through the agency head's qualification decision.

The employee bears the burden of establishing that the grievance was timely initiated. Thus, employees are strongly encouraged to document the initiation date, for instance, by using certified mail or requesting a date-stamped photocopy of the "Form A." (Note: for purposes of establishing when a mailed grievance was initiated, the postmark date is considered the initiation date).

To promote improved employee relations, management may allow a grievance to proceed through the resolution steps, even if the grievance does not comply with the above requirements. If the agency intends to allow the grievance to proceed through the management steps but plans to deny a hearing due to noncompliance, management should inform the employee of that intention as soon as it becomes aware of the noncompliance.

¹ Note, however, that if two or more different agency actions arise out of the same facts, then the employee *must* initiate a separate grievance for each challenged agency action. For example, if an agency suspends an employee pending an administrative investigation due to the employee's alleged misconduct, the employee must initiate his grievance within 30 calendar days of the suspension if he intends to challenge the suspension. If he is later issued a formal disciplinary action (a Written Notice) for the same alleged misconduct, the employee *must* file a new grievance to contest the Written Notice within 30 calendar days of receiving the Notice if he intends to challenge it.

As a general rule, an employee must initiate a grievance with the **first-step respondent**, who is usually his immediate supervisor. However, under the following circumstances, the grievance is initiated with someone other than the immediate supervisor:

1. A grievance alleging discrimination or retaliation by the immediate supervisor may be initiated with the next level supervisor;
 2. A grievance involving a termination, demotion, suspension without pay, or any other action that results in a loss of wages may be initiated with the **second-step respondent**, under the single management step ***Expedited Process***. Within five workdays of the second-step response, the employee may request the agency head to qualify the grievance for a hearing;
 3. In grievances involving formal discipline (**Written Notices**) issued by someone other than the employee's immediate supervisor, the employee may initiate the grievance with the person who issued the discipline; and
 4. A grievance challenging the application of the layoff policy should be initiated with the Human Resources Office of the employee's agency. (Note: if the grievance involves a pay loss, the employee may use the expedited process and initiate the grievance with the second-step respondent (see #2 above)).
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§2.5 Gathering Information

After a grievance is initiated, a **party** may ask to review documents that pertain to the grievance. See "Documentation Relating to a Grievance," §8.2.

§3 Management Resolution Steps

NOTE: Words **bolded** appear in the definition section.

§3.1 First Resolution Step

The first-step respondent must:

1. Accept the grievance;
2. Enter the date of receipt on the "Form A"; and,
3. Notify the agency's Human Resources Office of the grievance.

After receiving the written grievance, the first-step respondent should identify the issues, gather information and review the facts. A meeting may be held to discuss the issues in dispute, but such a meeting is not required. Within 5 workdays of receiving the grievance, the first-step respondent must provide a written response on the grievance "Form A" or an attachment. The response must address the issues and the relief requested and should notify the employee of his procedural options.

Within 5 workdays of receiving the first-step response, the employee must:

1. Indicate on the grievance form his intention to continue to the second-step meeting and submit the form to the second-step respondent; or
 2. Indicate on the grievance form his intention to conclude the grievance and submit the form to the Human Resources Office.
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§3.2 Second Resolution Step Meeting

The second-step respondent must:

1. Accept the grievance;
2. Enter the date of receipt on the “Form A”; and,
3. Advise the agency’s Human Resources Office that the grievance has advanced.

Within 5 workdays of the second-step respondent’s receipt of the grievance, the second-step meeting must be held. The persons who may be present at this meeting are the employee, an individual selected by the employee, the second-step respondent and an individual selected by the second-step respondent. Either party may call witnesses. These witnesses must not be present except while providing information.

The purpose of the second-step meeting is fact finding. Accordingly, the parties are encouraged to present information relevant to the grievance at this meeting. While the parties may question one another regarding disputed facts and issues, the meeting should not be adversarial or treated as a hearing. The second-step respondent is charged with presiding over the meeting and must do so in an even-handed manner. Thus, for example, while the second-step respondent could limit the introduction of repetitive information, he should not prohibit an employee from disclosing relevant information not previously provided. The meeting must not be recorded unless one of the parties has a disability that would be accommodated by recording the meeting.

Within 5 workdays of the second-step meeting, the second-step respondent must provide a written response on the grievance “Form A” or an attachment. The response must address the issues and the relief requested and should notify the employee of his procedural options.

Within 5 workdays of receiving the second-step response, the employee must:

1. Indicate on the grievance form his intention to continue to the third-step and submit the form to the **third-step respondent**; or
2. Indicate on the grievance form his intention to conclude the grievance and submit the form to the Human Resources Office.

In the event that an employee alleges retaliation or discrimination by an individual who would otherwise serve as the agency’s second-step respondent, the employee may:

1. Request that the agency designate another second-step respondent; or
 2. Waive the face-to-face meeting with the original second-step respondent and receive only a written second-step response to the grievance. If the employee elects to waive the face-to-face meeting with the original second-step respondent, the employee must be allowed to meet with the third-step respondent.
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§3.3 Third Resolution Step

The third-step respondent must:

1. Accept the grievance;
2. Enter the date of receipt on the “Form A”; and,
3. Advise the agency’s Human Resources Office that the grievance has advanced.

A meeting may be held to discuss the issues in dispute, but such a meeting is not required. Within 5 workdays of receiving the grievance, the third-step respondent must provide a written response on the grievance “Form A” or an attachment. The response must address the issues and the relief requested and should notify the employee of his procedural options.

Within 5 workdays of receiving the third-step response, the employee must:

1. Request on the grievance form that his grievance be qualified for a hearing* and submit the form to the agency head; or
2. Indicate on the grievance form his intention to conclude the grievance and submit the form to the Human Resources Office.

* NOTE: If the grievance is qualified for a hearing, the hearing decision will be published on EDR's Web site in a manner that seeks to preserve personal privacy. See “Publication of Hearing Decisions, Rulings, and Related Court Opinions,” §8.1.

§4 Qualification for a Hearing

NOTE: Words **bolded** appear in the definition section.

§4.1 Qualifying Actions

Not all grievances proceed to a hearing. Only grievances that challenge certain actions qualify for a hearing.

§4.1(a) Actions Which AUTOMATICALLY Qualify

1. Formal discipline (a Written Notice); and
2. Dismissal for unsatisfactory performance.

§4.1(b) Actions Which May Qualify

The grievance should qualify for a hearing if (i) it claims, and (ii) the facts, taken as a whole, raise a sufficient question as to whether an **adverse employment action** has occurred as a result of one or more of the following:

1. Unfair application or misapplication of state and agency personnel policies, procedures, rules, and regulations;
2. Discrimination on the basis of race, color, religion, political affiliation, age, disability, national origin, or sex;
3. **Arbitrary or capricious** performance evaluation;
4. Retaliation for participating in the grievance process, complying with any law or reporting a violation of such law to a governmental authority, seeking to change any law before Congress or the General Assembly, reporting an incidence of fraud, abuse, or gross mismanagement, or exercising any right otherwise protected by law; or
5. Informal discipline – for example, terminations, transfers, assignments, demotions, and suspensions – which are not accompanied by formal discipline (a Written Notice) but which are taken primarily for disciplinary reasons.

§4.1(c) Actions Which DO NOT Qualify

Claims that relate solely to the following issues do not qualify for a hearing:

1. Establishment or revision of wages, salaries, position classifications, or general benefits;
2. Contents of statutes, ordinances, personnel policies, procedures, rules, and regulations;
3. Means, methods, and personnel by which work activities are undertaken;
4. Hiring, promotion, transfer, assignment, and retention of employees;
5. Termination, layoff, demotion, or suspension from duties because of lack of work, reduction in workforce, or job abolition;
6. Work activity accepted by an employee as a condition of employment or which reasonably may be expected to be a part of the content of the job;
7. Relief of employees from duties in emergencies; or
8. Informal supervisory actions – for example, interim evaluations, counseling memoranda, and oral reprimands.

The fact that the claim challenges an action under this section does not preclude it from qualifying if (i) the grievance claims, and (ii) the facts, taken as a whole, raise a sufficient question as to whether the action constituted an adverse employment action that was improperly tainted by (1) misapplication or unfair application of policy, (2) discrimination, (3) arbitrary performance evaluation, (4) retaliation, or (5) unwarranted discipline.

§4.2 Agency Head's Determination

Within 5 workdays of receiving the employee's hearing request, the agency head must determine whether the grievance qualifies for a hearing. The agency head must provide a written response on the grievance "Form A" or an attachment. The response should also notify the employee of his procedural options. Because this is the last opportunity to resolve the grievance within the agency, the agency head may address the issues and the relief requested by the employee. If the agency head qualifies the grievance for hearing, the agency's Human Resources Office must request the appointment of a hearing officer using the "Form B," within 5 workdays of the qualification decision. For hearing scheduling purposes, the agency must provide on the "Form B" the name and telephone number of its party representative or party designee.

§4.3 Appeal to EDR

If the agency head does not qualify the grievance for a hearing, the employee may appeal to the EDR Director.

If the employee appeals to EDR, the employee must submit his grievance form to the agency's Human Resources Office within 5 workdays of receiving the agency head's qualification decision. Within 5 workdays of receipt of the appeal request, the agency's Human Resources Office must copy and mail the grievance record, complete with all attachments, to EDR. (The original grievance record should be kept by the agency.)

If the agency head qualifies some but not all the grieved issues, the employee may ask EDR to qualify any remaining unqualified issues. A request to EDR for qualification of any such issues temporarily stops the grievance process until EDR issues its ruling.

NOTE: EDR rulings on qualification will be published on EDR's Web site in a manner that seeks to preserve personal privacy. See "Publication of Hearing Decisions, Rulings, and Related Court Opinions," §8.1.

§4.4 Circuit Court Appeal

If EDR does not qualify the grievance for a hearing, the employee may appeal that decision to the circuit court in the jurisdiction in which the grievance arose.

If the employee appeals, the employee must submit a written request to appeal to the agency's Human Resources Office within 5 workdays of receiving EDR's qualification decision. Within 5 workdays of receipt of the appeal request, the agency's Human Resources Office must copy and mail the grievance record, complete with all attachments, to the circuit court in the jurisdiction in which the grievance arose. The Human Resources Office must list the EDR Director as a copy recipient on the cover letter to the court accompanying the grievance record. (The original grievance record should be kept by the agency.)

If the Human Resources Office does not forward the record to the court, the employee may request the court to issue an order requiring the transmittal of the record.

Within 30 calendar days of receiving the grievance record, the court, sitting without a jury, should hear the appeal on the record and such additional evidence as may be necessary to resolve any controversy as to the correctness of the record. The court may receive other evidence at its discretion. The employee may represent himself or may be represented by an attorney. No other person may represent the employee. The decision of the court is final and not appealable.

Courts have rules regarding the appearance of witnesses and the scheduling of hearings. Therefore, prior to the hearing, a party should contact the clerk of the circuit court to discuss these issues.

NOTE: Court decisions may be published in full on EDR's Web site. See "Publication of Hearing Decisions, Rulings, and Related Court Opinions," §8.1.

§5 The Hearing

NOTE: Words **bolded** appear in the definition section.

§5.1 General

Most qualified grievances proceed to a hearing before a hearing officer.* Within 5 workdays of the qualification of the grievance, the agency must request the appointment of a hearing officer from EDR, using a "Form B." For hearing scheduling purposes, the agency must provide on the "Form B" the name and telephone number of its party representative or party designee. The hearing should be held and a written decision issued

within 35 calendar days of the hearing officer's appointment. This time can be extended only upon a showing of **just cause**. See also *Rules for Conducting Grievance Hearings*, available on EDR's Web site, which addresses in more detail the hearing officer's duties and authority under the grievance procedure.

*Certain qualified grievances with the Department of Corrections or the Department of Juvenile Justice, are heard by a circuit court. See "Exception for Hearings on Certain Qualified Grievances with the Departments of Corrections and Juvenile Justice," §5.10.

§5.2 Scheduling the Hearing

It is the responsibility of the hearing officer to notify the parties, either in writing or at a prehearing conference, of the date, time, and place of the hearing.

The hearing must be held in the locality where the employee is or has been employed unless the parties and hearing officer mutually agree to another site. The agency must arrange a place for the hearing unless the hearing officer chooses to make the arrangements.

§5.3 Prehearing Conference

A prehearing conference is required to be held. At the hearing officer's discretion, this conference can be conducted in person or by telephone. This conference provides an opportunity to improve the management of the hearing by addressing procedural and evidentiary issues. If a party desires to have a particular individual testify at hearing, or to have a particular document produced prior to hearing, the party may request the hearing officer to order the appearance of the individual, or the production of the document. The agency shall make available for hearing any employee ordered by the hearing officer to appear as a witness.

§5.4 Length of Hearing

A hearing is to last no more than one day, unless the hearing officer determines that the time is insufficient for a full and fair presentation of the evidence by both sides.

§5.5 Absence from the Hearing

The parties must appear at the hearing or request a postponement. The hearing officer has the discretion to grant or deny a request for a postponement. However, the hearing and decision may go beyond the 35-day time limit only upon a showing of **just cause**.

At the hearing officer's discretion, a hearing may proceed in the absence of one of the parties; a hearing so conducted will be decided on the grievance record and the evidence presented at the hearing.

§5.6 Recording the Hearing

The hearing must be tape recorded **verbatim** to create a record should there be an administrative or judicial review of the hearing decision. EDR's full-time hearing officers will provide their own recording equipment, with the agency providing the tapes. For hearings conducted by private sector part-time hearing officers, the agency has the responsibility to arrange for recording equipment. The equipment must be in proper

working order and produce a clearly audible recording. It is the hearing officer's responsibility to record the hearing and to retain the tapes until a final decision is rendered.

Either party may receive a copy of the recording, if requested, for the cost of reproduction. A court reporter is not required. If a party requests a court reporter, that party is responsible for the costs. Either party desiring a transcript should contact the court reporter directly. Once a hearing decision becomes final, the hearing officer shall forward the recorded tape(s) along with the rest of the hearing records to the agency.

§5.7 Authority of the Hearing Officer

A hearing officer's authority derives from Va. Code § 2.2-3000 et seq., the *Rules for Conducting Grievance Hearings*, and this *Grievance Procedure Manual*. Hearing officers have the authority to:

1. Hold a prehearing conference;
 2. Require the parties to exchange a list of witnesses and documents;
 3. Issue orders for the appearance of witnesses at hearing and the production of documents;
 4. Decide whether non-parties may attend the hearing (however, a representative of EDR may attend any hearing);
 5. Record the hearing verbatim;
 6. Administer oaths;
 7. Admit evidence and exclude evidence, including but not limited to evidence in mitigation or aggravation of any offense charged by agency,
 8. Accept offers of proof of excluded evidence;
 9. Rule on procedural requests;
 10. Render written decisions on qualified grievances and provide appropriate relief; and
 11. Take other actions as necessary or specified in the grievance procedure.
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§5.8 Rules for the Hearing

Hearing officers are bound by the provisions of Va. Code § 2.2-3000 et seq., the *Rules for Conducting Grievance Hearings*, and this *Grievance Procedure Manual*.

Hearings are to proceed as follows:

1. Parties may represent themselves or may be represented by an individual of choice; this representative does not have to be an attorney;
 2. In disciplinary actions and dismissals for unsatisfactory performance, the agency must present its evidence first and must show by a **preponderance of the evidence** that the action was warranted and appropriate under the circumstances;
 3. In all other actions, the employee must present his evidence first and must prove his claim by a preponderance of the evidence;
 4. Each party may make opening and closing statements;
 5. Formal rules of evidence do not apply;
 6. Testimony and exhibits may be admitted into evidence and made part of the record;
 7. Non-party witnesses are not to be present at the hearing except to give testimony and be **cross-examined**; and
 8. The hearing should be closed to the public.
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§5.9 Hearing Officer's Decision

A hearing officer's decision must be in writing.* The decision must contain findings of fact on the material issues and the grounds in the record for those findings. The hearing officer must send his decision by certified mail, return receipt requested, to each party and by First Class U.S. mail to EDR. In the alternative, the hearing officer may e-mail or fax the decision so long as proof of receipt is established.

Hearing officers may order appropriate remedies but may not grant relief that is inconsistent with law or policy. In granting relief, the hearing officer should consider the relief requested in the written grievance.

In hearings contesting formal discipline, if the hearing officer finds that (i) the employee engaged in the behavior described in the Written Notice, (ii) the behavior constituted misconduct, and (iii) the agency's discipline was consistent with law and policy, the agency's discipline must be upheld and may not be mitigated, unless under the record evidence, the agency's discipline exceeds the limits of reasonableness.

*NOTE: Hearing decisions will be published on EDR's Web site in a manner that seeks to preserve personal privacy. See "Publication of Hearing Decisions, Rulings, and Related Court Opinions," §8.1.

§5.9(a) Examples of relief which may be available:

1. Reinstatement to the employee's former position or, if occupied, to an objectively similar position;
2. Upholding, reducing or rescinding disciplinary actions;
3. An award of full, partial, or no **back pay**, from which **interim earnings** must be deducted;
4. The restoration of full benefits and seniority;
5. An order that the agency comply with applicable law and policy, and,
6. Attorneys' fees in discharge grievance hearings where the hearing officer orders reinstatement and the employee is represented by an attorney, unless special circumstances would make an award unjust. See "Special Rules for Discharge Hearings," § 7.2(e).

§5.9(b) Examples of relief which are not available:

1. Damages;
 2. Attorneys' fees in grievance hearings not challenging discharge;
 3. Hiring, promotion, transfer, assignment or retention of any employee;
 4. Establishing or revising compensation, classification or benefits;
 5. Establishing or revising policies, procedures, rules, or regulations;
 6. Taking any adverse action against an employee (other than upholding or reducing the disciplinary action challenged by the grievance);
 7. Directing the methods, means or personnel by which work activities are to be carried out; or,
 8. Any other relief that is inconsistent with the grievance statute or procedure.
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§5.10 Exception for Hearings on Certain Qualified Grievances with the Departments of Corrections and Juvenile Justice

Qualified grievances of employees of the Departments of Corrections or Juvenile Justice, whose employment was terminated for (i) client, inmate, or resident abuse, (ii) a criminal conviction, or (iii) being placed on court probation under the provisions of Va. Code § 18.2-251, proceed to a hearing before the circuit court in the jurisdiction in which the employee had been employed. In its discretion, the court may refer the matter to a lawyer who serves as a commissioner in chancery to take such evidence as may be proper and to make a report to the court.

Parties may represent themselves or be represented by an individual of choice; this representative does not have to be an attorney. Such representatives may examine, cross-examine, question, and present evidence before the court. The court, sitting without a jury, must hear the evidence. The agency's action is to be upheld unless shown to have been unwarranted by the facts or contrary to law or policy. The decision of the court may be appealed by either party to the Court of Appeals pursuant to Virginia Code §17.1 - 405.

NOTE: Court decisions may be published in full on EDR's Web site. See "Publication of Hearing Decisions, Rulings, and Related Court Opinions," §8.1.

§5.11 Withdrawal of Grievance

When an employee withdraws the grievance prior to the issuance of a hearing decision, or when the parties agree to a settlement of the grievance, the employee must submit to the hearing officer a dated, **signed** statement clearly stating that he or she is withdrawing the grievance. Such a withdrawal statement terminates the grievance process. It is not necessary for the parties to send a copy of the settlement agreement to the hearing officer. The hearing officer shall issue an Order of Dismissal solely to document that the employee has withdrawn the grievance and that the grievance has been dismissed.

§6 Noncompliance with the Grievance Procedure

NOTE: Words **bolded** appear in the definition section.

§6.1 General

From the time that a grievance is initiated until the hearing decision becomes final, a party or a hearing officer may fail to comply with a provision of the grievance procedure. A party may challenge such noncompliance to the Director of EDR, who is authorized to issue final, nonappealable rulings on compliance challenges.

A challenge to EDR will normally stop the grievance process temporarily. The grievance process will resume when EDR issues its ruling on the challenge.

NOTE: EDR rulings on compliance will be published on EDR's Web site in a manner that seeks to preserve personal privacy. See "Publication of Hearing Decisions, Rulings, and Related Court Opinions," §8.1.

§6.2 Grievance Initiation Noncompliance

The employee's "Form A" must comply with the requirements for initiating a grievance. See "Initiating a Grievance," §2.4.

If the "Form A" does not comply:

1. Management may notify the employee, using the "Form A," that the grievance will be administratively closed due to noncompliance and that the employee may seek a compliance ruling from the EDR Director.
 2. The employee may request, within 5 workdays of receiving notice that the grievance will be closed, that the EDR Director decide whether the grievance is in compliance and can proceed. Any such ruling request must be accompanied by a copy of the grievance record, complete with all attachments. (The original grievance record should be kept by the agency).
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§6.3 Party Noncompliance

Parties must comply with the requirements of the grievance procedure. All claims of noncompliance should be raised immediately. By proceeding with the grievance after becoming aware of a procedural violation, one may forfeit the right to challenge the noncompliance at a later time. To remedy noncompliance, a party must:

1. Notify the other party in writing of the noncompliance (if the agency is out of compliance, written notice of noncompliance must be made to the agency head);
2. Allow the other party 5 workdays after receipt of the written notice to correct the noncompliance;
3. If the noncompliance is corrected within the 5 workdays, the party is considered in compliance and no relief will be available from EDR;
4. If the noncompliance is not corrected within the 5 workdays, the party may request a ruling from EDR (providing the other party with a copy of that request); the request must identify the specific requirement of the grievance procedure that has not been followed.
5. If the Director of EDR finds that a party has failed to correct the noncompliance within the 5 workdays, the Director may (i) order the party to correct the noncompliance, or (ii) where a substantial **procedural requirement** of the grievance procedure was violated without just cause, render a decision against the noncomplying party on any qualifiable issue.

Once a grievance has been qualified for hearing, any claims of party noncompliance occurring during the hearing phase should be raised in writing with the hearing officer appointed to hear the grievance. If a party disagrees with a hearing officer's decision or order on a matter of compliance, an objection should be made to the hearing officer, and a ruling from EDR must be requested in writing and ***received by EDR*** within 15 calendar days of the date of the hearing decision.

§6.4 Hearing Officer Noncompliance

In presiding over the hearing process and in rendering hearing decisions, hearing officers must comply with the requirements of the grievance procedure and the *Rules for Conducting Grievance Hearings* promulgated by the Director of EDR. If the hearing decision is out of compliance, a party may challenge the decision to the Director of EDR.

(See “Administrative Review of Hearing Decisions,” §7.2). If the noncompliance arises in pre-hearing matters or in the conduct of the hearing, the hearing officer’s noncompliance may be remedied as follows:

1. An objection should be made to the hearing officer at the time the noncompliance occurs;
 2. A ruling from EDR must be requested in writing and **received by EDR** within 15 calendar days of the date of the hearing decision; and,
 3. If EDR finds that the hearing officer has failed to comply with the grievance procedure, the sole remedy is an order by EDR that the hearing officer correct the noncompliance.
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§7 Review of Hearing Decisions

NOTE: Words **bolded** appear in the definition section.

§7.1 General

A hearing decision must be consistent with law and policy. A hearing decision is subject to administrative and judicial review. Once the administrative review phase has concluded, the hearing decision becomes final and is subject to judicial review.

§7.2 Administrative Review of Hearing Decisions

§7.2(a) Types of Review

A hearing officer’s original decision is subject to three types of administrative review. A party may make more than one type of request for review. However, all requests for review must be made in writing, and **received** by the administrative reviewer, within 15 calendar days of the date of the original hearing decision. Requests may be initiated by electronic means such as facsimile or e-mail. However, as with all aspects of the grievance procedure, a party may be required to show proof of timeliness. Therefore, parties are strongly encouraged to retain evidence of timeliness. A copy of all requests must be provided to the other party and to the EDR Director.

1. A request to reconsider a decision or reopen a hearing is made to the hearing officer. This request must state the basis for such request; generally, newly discovered evidence or evidence of incorrect legal conclusions is the basis for such a request.
2. A challenge that the hearing decision is inconsistent with state or agency policy is made to the Director of the Department of Human Resources Management (DHRM). This request must refer to a particular mandate in state or agency policy. The Director’s authority is limited to ordering the hearing officer to revise the decision to conform it to written policy. Requests should be sent to the Director of the Department of Human Resources Management, 101 N. 14th Street, 12th Floor, Richmond, Virginia 23219 or faxed to (804) 371-7401.
3. A challenge that the hearing decision does not comply with the grievance procedure is made to the Director of EDR. Requests should be sent to the EDR Director, One Capitol Square, 830 East Main, Suite 400, Richmond, VA 23219 or faxed to (804) 786-0111. This request must state the specific requirement of the grievance procedure with which the hearing decision is not in compliance. The Director’s authority is limited to ordering

the hearing officer to revise the decision so that it complies with the grievance procedure. (See also, "Hearing Officer Noncompliance," §6.4).

The opposing party may submit a written challenge (rebuttal) to any appeal to the appropriate administrative reviewer. A copy of any such rebuttal must also be provided to the appealing party and the EDR Director.

NOTE: All administrative review rulings or decisions may be published on EDR's Web site in a manner that seeks to preserve personal privacy. See "Publication of Hearing Decisions, Rulings, and Related Court Opinions," §8.1.

§7.2(b) Transcripts of the Hearing

A party may elect to produce a transcript to support its position on appeal. As a general rule, the party that elects to have a transcript produced is responsible for the costs of producing the transcript. An administrative reviewer may also request a party to provide a full or partial transcript of the hearing to support the party's position and if so provided, that party must bear the cost of production.

1. If the employee is ordered or elects to provide a transcript, the agency may obtain a copy directly from the court reporter at the agency's expense.
2. If the agency is ordered or elects to provide a transcript, the employee must be allowed, upon request, reasonable access to the agency's copy of the transcript in order to respond to the agency's case. The employee may also obtain a copy of the transcript from the court reporter at the employee's expense.

§7.2(c) Administrative Review Decisions

If multiple requests for administrative review are pending, a hearing officer's decision on reconsideration or reopening should be issued before the DHRM and EDR Directors issue their decisions.

The hearing officer should issue a written decision on a request for reconsideration or reopening within 15 calendar days of receiving the request.

The DHRM and EDR Directors should issue written decisions on requests for administrative review within 30 calendar days of receiving the request or within 15 calendar days of receiving the hearing officer's decision on a request for reconsideration or reopening, whichever is longer. Administrative review decisions issued by the Directors of DHRM and EDR are final and nonappealable. If the DHRM or EDR Director orders the hearing officer to revise his decision, the hearing officer must do so and should issue a written decision within 15 calendar days of receiving the order.

§7.2(d) Final Hearing Decisions

A hearing officer's original decision becomes a final hearing decision, with no further possibility of administrative review, when:

1. The 15 calendar day period for filing requests for administrative review has expired and neither party has filed such a request; or
2. All timely requests for administrative review have been decided and, if ordered by EDR or DHRM, the hearing officer has issued a revised decision.*

*See §7.2(e) below for special rules regarding final hearing decisions in discharge hearings where the hearing officer orders reinstatement of an employee represented by an attorney.

§7.2(e) Special Rules for Discharge Hearings Where the Hearing Officer Orders Reinstatement of an Employee Represented by an Attorney

Attorneys' fees are not available under the grievance procedure, **with one exception**: an employee who is represented by an attorney and substantially prevails on the merits of a grievance challenging his discharge is entitled to recover reasonable attorneys' fees, unless special circumstances would make an award unjust. For such an employee to "substantially prevail" in a discharge grievance, the hearing officer's decision must contain an order that the agency reinstate the employee to his former (or an objectively similar) position.

In such a case, when the hearing officer issues the initial decision ordering reinstatement, the decision is considered an "original" decision as described in §7.2(a). Thus, within 15 calendar days of the issuance of the original decision, either party may seek administrative review in accordance with §7.2(a). In addition, counsel for the grievant shall ensure that the hearing officer receives, within 15 calendar days of the issuance of the original decision, counsel's petition for reasonable attorneys' fees. The petition shall include an affidavit itemizing services rendered, time billed for each service, and the hourly rate charged in accordance with the *Rules for Conducting the Grievance Hearings*. A copy of the fees petition must be provided to the opposing party at the time it is submitted to the hearing officer. The agency may contest the fees petition by providing a written rebuttal to the hearing officer.

If neither party requests an administrative review, the hearing officer must issue an addendum to the decision denying or awarding, in part or in full, the fees requested in the petition, and should do so no later than 30 days from the date of the initial decision.

If either party has timely requested an administrative review as described in §7.2(a), all other administrative reviews must be issued (including any reconsidered decision by the hearing officer) before the hearing officer issues the fees addendum. The hearing officer should issue the fees addendum within 15 calendar days of the issuance of the last of the administrative review decisions.

Within 10 calendar days of the issuance of the fees addendum, either party may petition the EDR Director for a decision solely addressing whether the fees addendum complies with this *Grievance Procedure Manual* and the *Rules for Conducting Grievance Hearings*. Once the EDR Director issues a ruling on the propriety of the fees addendum, and if ordered by EDR, the hearing officer has issued a revised fees addendum, the original decision becomes "final" as described in §7.2(d) and may be appealed to the Circuit Court in accordance with §7.3(a). The fees addendum shall be considered part of the final decision.

Like all final hearing decisions, a final decision rendered by a hearing officer under this subsection (7.2(e)) shall not be enforceable until the conclusion of any judicial appeals.

§7.3 Judicial Review of Final Hearing Decisions

§7.3(a) Circuit Court Review

Once an original hearing decision becomes final, either party may seek review by the circuit court on the ground that the final hearing decision is contradictory to law.

An employee does not need EDR's approval before filing a notice of appeal. However, an agency must request and receive approval from the Director of EDR before filing a notice of appeal. To request approval to appeal, an agency must, within 10 calendar days of the final hearing decision, submit a written request to EDR and must specify the legal basis for the appeal, in other words, the basis for its position that the hearing decision is “contradictory to law.” The agency must provide a copy of its appeal request to the employee. EDR will provide a response within 10 calendar days of the agency’s request.

A notice of appeal must be filed with the clerk of the circuit court in the jurisdiction in which the grievance arose within 30 calendar days of the final hearing decision. At the time of filing, a copy of the notice of appeal must be provided to the other party and the EDR Director.

Within 10 calendar days of receiving the notice of appeal, the agency’s Human Resources Office must mail a copy of the grievance record, complete with all attachments, to the circuit court in the jurisdiction in which the grievance arose. (The original grievance record should be kept by the agency.)

If the Human Resources Office does not forward the grievance record to the court, the employee may request the court to issue an order requiring the agency to transmit the record.

Within 30 days of receipt of the grievance record, the court, sitting without a jury, shall hear the appeal on the record. The court may affirm, reverse, or modify the final hearing decision. The court’s decision shall be rendered within 15 days of the court hearing, which shall be at no cost to the parties. The court shall award reasonable attorney’s fees and costs to the employee if the employee substantially prevails on the merits of the appeal.

§7.3(b) Appeal to the Court of Appeals

Either party may appeal the final decision of the circuit court to the Court of Appeals pursuant to Virginia Code § 17.1-405.

§7.3(c) Implementation

Either party may petition the circuit court having jurisdiction in the locality in which the grievance arose for an order requiring **implementation** of the final decision. The petitioning party must provide the EDR Director a copy of the petition. The court shall

award reasonable attorneys' fees and costs to the employee if the employee substantially prevails on the merits of the implementation.

§8 Additional Grievance Procedure Rules

NOTE: Words **bolded** appear in the definition section.

§8.1 Publication of Hearing Decisions, Rulings, and Related Court Opinions

EDR will publish rulings and hearing decisions on its Web site in a manner that seeks to preserve privacy. EDR may also publish related court opinions in full. See also EDR's Publication Policy on its Web site, at "Publications."

§8.2 Documentation Relating to a Grievance

Absent just cause, all documents relating to the actions grieved shall be made available, upon request from a party to the grievance, by the opposing party. (Once a grievance has been initiated, an employee's request for documents relating to his grievance, pursuant to the Freedom of Information Act ("FOIA"), shall also be treated by the agency as a request for documents under the grievance procedure.)

Upon receipt of such a request, a party shall have a duty to search its records to ensure that, absent just cause, all such relevant documents are provided. All such documents must be provided within 5 workdays of receipt of the request. If it is not possible to provide the requested documents within the 5 workday period, the party must, within 5 workdays of receiving the request, explain in writing why such a response is not possible, and produce the documents no later than 10 work days from the receipt of the document request. If responsive documents are withheld due to a claim of irrelevance and/or "just cause," the withholding party must provide the requesting party with a written explanation of each claim, no later than 10 workdays from the receipt of the document request. The party requesting the documents has the option of demanding, in writing, that the grievance process temporarily halt until the documents are provided. (An employee's demand shall be presented to the agency's Human Resources Office.)

Documents pertaining to non-parties that are relevant to the grievance shall be produced in such a manner as to preserve the privacy of the individuals not personally involved in the grievance. A party shall not be required to create a document if the document does not exist.

If a document request is denied prior to the appointment of a hearing officer, then the requesting party may seek relief from EDR pursuant to the rules for Party Noncompliance. See, "Party Noncompliance," §6.3. After a hearing officer is appointed, relief should be sought from the hearing officer. See "Authority of the Hearing Officer," §5.7.

§8.3 Computation of Time

In computing any period of time required by this procedure, the day of the event from which the designated period of time begins to run shall not be included.

Example: If a step-respondent receives the grievance "Form A" from an employee on Tuesday, then Wednesday is considered the first of the 5 workdays in which the step-respondent must respond to the grievance. Assuming a normal workweek (Monday through Friday), then Wednesday is counted as day 1 and the response from the step-respondent will be due on the following Tuesday, day 5.

§8.4 Extension of Timeframes

Upon mutual agreement, parties to a grievance may extend all pre-qualification time limits including, but not limited to, the 30 calendar day grievance initiation requirement. After a hearing officer is assigned, a request for postponement of the hearing must be directed to the hearing officer. To be enforceable, ALL EXTENSION AGREEMENTS BETWEEN THE PARTIES MUST BE IN WRITING.

§8.5 Consolidation of Grievances for Hearing

Prior to the appointment of a hearing officer, multiple grievances may be treated by the parties in a joint manner, without a ruling from EDR. For instance, the parties could agree to address two or more grievances at any given management step after which the step-respondent could issue a single response that addresses the issues and relief raised in each of the grievances. However, only EDR can consolidate multiple grievances for a single hearing. Accordingly, if more than one grievance is pending involving the same: (1) factual background, and (2) issues or policies, either party may request consolidation for hearing purposes. EDR strongly favors consolidation and will grant consolidation for hearing purposes unless there is a persuasive reason to process the grievances individually. EDR may consolidate grievances for hearing without a request from either party. After a hearing officer has been appointed, EDR will not accept requests for consolidation for hearing except under extraordinary circumstances.

§8.6 Leave and Reimbursement

Employees are to be granted administrative leave to consult with EDR, to serve as a representative for an employee within the agency, and to appear as a witness in a grievance matter. Employees are also granted administrative leave to participate in the steps of the grievance process. Agencies may grant the employee reasonable time to prepare for the presentation of the grievance.

Reasonable costs for transportation, meals, and lodging are to be reimbursed in accordance with state travel regulations.

§8.7 Reasonable Accommodations for Disabled Persons

The agency must provide reasonable accommodations for disabled persons participating in the grievance process.

§8.8 Use of Agency Office Equipment

Grievances are official business. Therefore, in processing grievances, parties and state employee representatives of parties may make reasonable use of agency office equipment including computers, copiers, fax machines, and telephones.

§8.9 Identifying Step Respondents and Agency Heads

Each agency has designated individuals to serve as respondents in the resolution steps. These designations are available at the agency's Human Resources Office and from EDR.

§9 Definitions

Adverse Employment Action - Any employment action resulting in an adverse effect on the terms, conditions, or benefits of employment.

Agency Head - The Director, Commissioner, or other appointed head of the state agency or the individual who has been delegated the authority to act for the agency head.

Arbitrary or Capricious - In disregard of the facts or without a reasoned basis.

Attachments - Documents joined with the grievance form in the resolution steps and in the qualification decision.

Back Pay - Retroactive payment of wages, bonuses, leave or other benefits, overtime (if a requisite of the job) and other forms of fixed compensation, as directed by the hearing officer.

Cross-Examination - Questioning by the opposing party to test the truth or further develop the prior testimony of a witness.

Discrimination - Different or hostile treatment based on race, color, religion, political affiliation, age, disability, national origin, or sex.

Expedited Process - A shortened process available for terminations, demotions or suspensions without pay, or loss of wages.

First-step Respondent - The immediate supervisor of the employee (the individual responsible for completing the performance evaluation or giving daily work instructions).

Grievance - Written complaint on the grievance form stating the nature of the claim, the facts in support of the claim, and the relief requested.

Harass - Action taken with the intent or purpose of impeding the operations of the agency.

Implementation - An order issued by the court directing a party to carry out a final hearing decision.

Interim Earnings - Income earned or received in lieu of state salary or other regularly earned compensation including but not limited to unemployment compensation benefits.

Involuntary Separation - Separation which is not of free will; resignation obtained through misrepresentation, deception, duress, coercion, or time pressure.

Just Cause - A reason sufficiently compelling to excuse not taking a required action in the grievance process.

Mediation - Voluntary process through which individuals, with the assistance of mediators, may reach an agreement to resolve work-related issues.

Noncompliance - Failure to follow a grievance procedure rule.

Offers of Proof - Documents, testimony and other evidence offered but not admitted into the record.

Party - Either the employee who initiates the grievance or her employing agency.

Preponderance of the Evidence - Evidence which shows that what is intended to be proved is more likely than not; evidence that is more convincing than the opposing evidence.

Procedural Requirements - Formal procedures deemed essential to ensure fairness in the grievance process.

Retaliation – Adverse employment actions taken by management or condoned by management because an employee exercised a right protected by law or reported a violation of law to a proper authority (e.g. "whistleblowing").

Second-step Respondent - An individual designated by the agency who is in a senior management position and has the requisite authority to provide the employee with appropriate relief.

Third-step Respondent - The agency head or an individual designated by the agency who is a deputy, assistant commissioner, director, or manager most senior in the employee's line-of-supervision and who has the last opportunity to resolve the grievance in the resolution steps.

Verbatim - Taken word by word but not necessarily transcribed.

Workday - Normal work schedule (excluding authorized leave time) for the individual responsible for taking the required action.

Written Notice - Formal written disciplinary action taken under the Standards of Conduct.